Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

SUPPLEMENTAL BRIEF TO JURISDICTIONAL STATEMENT

SIDNEY H. YATEMAN
ATTORNEY AT LAW
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953
TELEPHONE: (408)375-4221

IN PROPRIA PERSONA

DECEMBER 29, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-646

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

SUPPLEMENTAL BRIEF TO JURISDICTIONAL STATEMENT

Appellant Sidney Hersh Yateman submits this supplemental brief calling attention to further unresolved federal questions resulting from the new legislation of Title X, Uniformed Services Former Spouses' Protection Act published and distributed since Appellant's last filing.

ADDITIONAL QUESTIONS PRESENTED

I. Whether retired military compensation is "deferred compensation for services already completed or reduced compensation for current services.

II. Whether Title X, Uniformed Services Former Spouses' Protection Act is constitutional with respect to its retroactive application to June 25, 1981.

TABLE OF CONTENTS

Questions Presented..... ii

Table of Contents..... iii

Table of Authorities..... iv

Additional Questions which are Substantial

THE NATURE OF MILITARY COMPENSATION AS EITHER "DEFERRED" COMPENSATION FOR SERVICES ALREADY COMPLETED OR, REDUCED COMPENSATION FOR THE SPECIAL OBLIGATIONS IMPOSED ON RETIREES, IS A MOST SUBSTANTIAL FEDERAL QUESTION AFFECTING THE CONSTITUTIONALITY OF TAKING PART OR ALL OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW..... 1

THE RETROACTIVE APPLICATION OF TITLE X, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT TO JUNE 25, 1981 IS UNCONSTITUTIONAL SINCE IT CONSTITUTES A TAKING OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW..... 6

THE RESERVATION OF JURISDICTION BY THE STATE COURT IS SUFFICIENT TO PRESERVE THE FEDERAL PRE-EMPTION ISSUE; A SUBSTANTIAL FEDERAL QUESTION..... 7

CONCLUSION..... 9

Proof of Service by Mail..... 11

Appendix

A. Statute Involved..... 12

TABLE OF AUTHORITIES

CASES CITED:

(Bennett v. Bennett)
131 Cal. App. 3d 299 (1982)- - - - - - - -7,9

In Re Marriage of Milhan II
97 Cal. App. 3d 41 (1979) - - - - - - - - 7

In Re Marriage of Jacanin
124 Cal. App. 3d 67 (1981)- - - - - - - - 9

In Re Marriage of Mahone
123 Cal. App. 3d 17 (1981)- - - - - - - - 9

In Re Marriage of Sheldon
124 Cal. App. 3d 371 (1981)- - - - - 8,9

McCarty v McCarty
453 U.S. _____,101 S. Ct, 2728 (1981) 1,6,7,9

Wintress v. Superior Court
131 C.A. 3d 906 (1982)- - - - - - - - - - 7,9

STATUTES CITED

Title X, Uniformed Services Former Spouses' Protection Act P.L. 97-252
(September 8, 1982)- - - - - - - - - - - -1,6

I

THE NATURE OF MILITARY COMPENSATION AS EITHER "DEFERRED" COMPENSATION FOR SERVICES ALREADY COMPLETED OR, REDUCED COMPENSATION FOR THE SPECIAL OBLIGATIONS IMPOSED ON RETIREES, IS A MOST SUBSTANTIAL FEDERAL QUESTION AFFECTING THE CONSTITUTIONALITY OF TAKING PART OR ALL OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW.

When the Congress passed the Uniformed Services Former Spouses Protection Act, the new law affected the decision McCarty v McCarty 453 U.S. ____, 101 S. Ct. 2728 (1981) wherein the court had reaffirmed the long-established doctrine that retired pay is an individual entitlement, with payments at a reduced rate for reduced but continuing service.

If the new law regards part of the retired pay as the property of the ex-spouse, surely the rest of it must be the property of the retiree. And, if it is property after the divorce, it must have been property before the divorce. Further, if it is property, it appears it must be unconstitutional to take part or all of it away without due process of law. This would be proper

only if it is accepted that the military retired pay is vested property in the same sense that a Civilian annuity is vested. But Congress has not been treating retired pay as though it were vested property. Time after time, it has changed the laws governing amounts and conditions of entitlement without regard to principles of due process.

There was a law on the books in 1958 that required recomputation of retired pay on the basis of new, higher basic pay rates. But Congress superceded that law with another providing a smaller raise for retirees. In 1963, retired pay raises were tied to inflation. For some years, a one percent "kicker" was added to each cost-of-living adjustment. Recently, the frequency of adjustments has been cut, the amounts cut for those under age 62 and the increases delayed an additional month in each of the next three years. New "double-dipper" restrictions impose a salary penalty for military retirees who work as federal civilians.

If retired pay is property, these actions appear to violate contractual equity and due process. There is no emergency, the retirees acquired their entitlements legally, they owe no debt to the government; hence no valid tax can be levied retroactively on their property.

It is essential that this Court settle a fundamental question: Just what is military "retired pay?" Is it deferred compensation for past services? Or is it current pay for reduced current service? Was it earned year by year on active duty? Or is it a current incentive for reduced service, one that can be reduced at any time?

If it should be established clearly as property, retired pay earned in the past might have to be recomputed, year by year, to assess its value in terms of the laws in effect at the time it was earned. Thus, if people retired under a law establishing their retired pay as a fixed ratio to basic pay (50 percent for 20 years, and so on), that

entitlement might be vested and permanent.

Likewise, the laws in effect during each year of service might have to be given full weight in such calculations. For example, the reduction of retired pay for those under age 62 was not on the books when most of the people now in the service first entered. Can the value of the service they performed in past years be reduced by a subsequent act of Congress?

If Cost-of-Living adjustments were made twice a year when a person first retired, does that become an implied contractual obligation on the part of the government to continue such a schedule? Perhaps it means that if a person was on active duty for two years while that schedule was in effect, then the two years' value on subsequent retirement would have to be adjusted twice a year. In other words, five percent of the person's annuity in this example would be adjusted for inflation twice a year.

Historically, the government's legis-

lative and judicial branches all have treated retired pay as pay for current service. There were a few disparities. Retired pay could not be counted as currently earned income for purposes of establishing Individual Retirement Accounts or for the "earned income exclusion" break in the federal income tax provisions. Nor was it counted as income subject to the Social Security tax.

If it is pay for current service, then there is ground for claiming that the government can enforce restrictions on "second-career" employment, enforce dual compensation reductions in federal civilian pay, order people back to active duty involuntarily - interrupting their private business and personal pursuits - and demand adherence to the requirements of the Uniform Code of Military Justice on penalty of court-martial, with possible punishments ranging from fines all the way to discharge from military status and permanent forfeiture of

retired pay.

If, instead, it is deferred compensation - vested property, in other words - then a lot of new calculations will have to be made as to how much is owed to those now retired and to those still on active duty whose past service was performed under a variety of different laws.

II

THE RETROACTIVE APPLICATION OF TITLE X, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT TO JUNE 25, 1981 IS UNCONSTITUTIONAL SINCE IT CONSTITUTES A TAKING OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW.

When Congress passed the Uniformed Services Former Spouses' Protection Act it provided an effective date of February 1, 1983. However, the Congress attempted to overrule this Court's decision in McCarty v McCarty by the wording of legislation. Although the legislation was not passed until September 1982, the specific wording includes the following:

> "Subject to the limitations of this section, a Court may treat disposable retired or retainer pay payable to a member for pay periods beginning

after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

This learned Court should note that numerous cases are affected by the retroactive application of the Uniformed Services Former Spouses Protection Act to McCarty v McCarty. This appeal, for example, would have been a companion case to McCarty and Milhan but for the improper actions of appellant's attorney discussed in the Jurisdictional Statement and Motion to Oppose Appellee's Motion to Dismiss or Affirm.

III

THE RESERVATION OF JURISDICTION BY THE STATE COURT IS SUFFICIENT TO PRESERVE THE FEDERAL PRE-EMPTION ISSUE; A SUBSTANTIAL FEDERAL QUESTION.

Since Appellant's Appellate decision was rendered the decisions of Wintriss v. Superior Court, 131 C.A. 3d 906 (1982) and Bennett v. Bennett 131 C.A. 3d 299 (1982), have come down as published decisions in California and they are clear that a reservation of jurisdiction is proper to keep

before the trial court the question of who is entitled to ongoing payments of military retired pay. The reservation of jurisdiction contained in Appellant's Interlocutory Decree, drafted in 1978, is extremely broad:

> "Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences."

Appellee has never argued that the reservation of jurisdiction was insufficient to preserve the Federal pre-emption issue. Indeed, her counsel drafted it, and any doubt of its meaning would be interpreted against her.

This case fits the ruling of In Re Marriage of Sheldon (1981) 124 C.A. 3d 371,

which held in pertinent part that McCarty would apply to closed cases if there had either been a reservation of jurisdiction over the military retired pay issue or a request to the trial court to retain jurisdiction that had been denied and timely taken up on appeal. It is not a Mahone situation (In Re Marriage of Mahone (1981) 23 C.A.3d 17) as indicated by appellee wherein there was a substantive stipulation that military retired pay would be divided but no reservation of jurisdiction over the character of the ongoing payments or any request, timely appealed from, that the court so reserve jurisdiction. McCarty, supra; In Re Marriage of Jacanin (1981) 124 C.A. 3d 67; Sheldon, supra; Wintriss, supra; and Bennett, supra, are dispositive.

CONCLUSION

Recent Congressional legislation has generated additional federal questions for this Court to consider in addition to those already presented in the Jurisdictional

Statement. For this reason, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SIDNEY H. YATEMAN
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953

December 29, 1982 _____ In Propria Persona

A copy of this Jurisdictional Statement shall be served upon the Attorney General of California, as 28 U.S.C. § 2403 (b) applies to this appeal.

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My address is Fremont Professional Center, Seaside, CA 93955. I served the foregoing document by depositing a true copy thereof in the United States mails in Seaside, State of California, on December 30, 1982, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Clerk of the First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, CA 94102

Honorable Nat A. Agliano
Judge of the Superior Court
Monterey County Courthouse
Post Office Box 1819
Salinas, CA 93902

William B. Daniels Esq., (3)
Attorney at Law
563 Figueroa Street
Monterey, CA 93940

Executed on December 30, 1982 at Seaside, California.

I declare under penalty of perjury that the foregoing is true and correct.

Saul M. Weingarten

APPENDIX A

STATUTES INVOLVED

Title X - Former Spouses' Protection (Public Law - 97-252)

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The amendments made by this title shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.

Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the affective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.